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No. 84-1616

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PARSONS STEEL, INC., JIM D. PARSONS, MELBA L. PARSONS; and TOM MCGREGOR, Trustee in Bankruptcy for the Estate of PARSONS STEEL INDUSTRIES, INC.,

Petitioners,

VS.

FIRST ALABAMA BANK OF MONTGOMERY, N. A., and EDWARD HERBERT,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below correctly affirm a district court injunction staying proceedings in a state court action in the following circumstances:

The district court found that an action there under the Bank Holding Company Act (12 U.S.C. § 1972) and a state court action were based on the same factual allegations and substantially the same damages claim. After a federal judgment in favor of respondents, petitioners sought to relitigate substantially identical matters in the state action. Because the state judgment in effect nullified the earlier federal one, the district court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect and effectuate its prior judgment.*

2. Did the court below correctly affirm the district court's inclusion in the scope of this injunction of a state court party—by choice not a party to the federal action—upon a factual finding of privity and adequate representation?

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* Petitioners do not present for review the federal question "of whether the courts below were correct in ultimately finding that the State Action was barred by the federal judgment under principles of res judicata and collateral estoppel..." (Bf., p. 28, n.20)

List of Parties: Parsons Steel, Inc.; Parsons Steel Industries, Inc., and Tom McGregor, as its Trustee in Bankruptcy; James D. Parsons; Melba Parsons; First Alabama Bank of Montgomery, N.A., a national banking association, substantially all of the stock of which is owned by First Alabama Bancshares, Inc., a registered bank holding company; and Edward Herbert, formerly an officer of this Bank.

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BRIEF OF RESPONDENTS

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 747 F.2d 1367 (11th Cir. 1984). It appears as Appendix A to the petition. The opinion of the United States District Court for the Middle District of Alabama ("District Court") of June 15, 1983 appears as Appendix B to the petition; the opinion of the District Court of March 29, 1985 (JA-344) appears as an appendix to respondents' brief in opposition; and the order of the District Court of May 21, 1985 is at JA-354.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of 28 U.S.C. § 2283 and § 1738 are contained in Petitioners' brief. The relevant portion of Rule 52(a) F.R.C.P. is also involved.[1]

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

On March 7, 1983 respondents ("Bank") brought an action in the district court under 28 U.S.C. § 2283[2] seeking an injunction against further proceedings in an Alabama state court action ("State Action")[3] as necessary "to protect or effectuate" the district court's earlier judgment of June 17, 1981 in a federal action (JA 72-88) ("Federal Action")—affirmed, sub nom. *Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242 (11 Cir. 1982; JA 89-95).

After hearing, the district court on June 15, 1983 enjoined petitioners (plaintiffs in State Action) from its further prosecution:

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[1] "...Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses...."

[2] "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."

[3] That State Action had by then proceeded to verdict and judgment against Bank and Herbert in the amount of $4,000,001 and was then pending there on post trial motions for judgment n.o.v. and alternatively for a new trial.

> "This Court is of the opinion (1) that the State Circuit Court, in trying an identical set of facts to those previously tried in this Court, has disregarded, and is disregarding, the final judgment of this Court over timely filed defenses of res judicata and collateral estoppel; (2) that, when those defenses were filed, the complicated pleadings obscured the similarity of proceedings and privy of parties from a State trial court unfamiliar with the prior litigation in this Court; and (3) that to allow a continuation of the State court proceedings in another State court would simply complicate the wrong."[4]

The district court held that a fourth state plaintiff, the petitioner Trustee in bankruptcy of Parsons Steel Industries,[5] though not a party to the earlier Federal Action, was barred by the doctrines of res judicata and collateral estoppel "from relitigation by a judgment in a case wherein he should and could have been made a party to assert the trustee's rights but elected not to do so." (A-40 of petition.)

The court below approved the district court's findings[6] and affirmed this judgment and order of injunction; but remanded

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[4] A. 42 of petition.

[5] Referred to as Parsons-Montgomery or "Subsidiary," a wholly owned subsidiary of one of petitioners, Parsons Steel, Inc., which was in turn co-owned by petitioners Melba and Jim Parsons. See 679 F.2d at 244; JA 89-90.

[6] 747 F.2d at 1370; A-5 of petition.

> "In a well-reasoned opinion, the federal district court found that the federal BHCA action and the state action were based on the same factual allegations and the damages claimed in each suit were substantially the same. The district court held that any additional state claims relating to the fact situation could have, and should have been raised in federal court under the doctrine of pendent jurisdiction. The BHCA action was therefore res

the case "for the narrow purpose of determining whether the Trustee should be barred from bringing his UCC action against the bank.'"

On March 29, 1985, after considering evidence of the parties, the district court declined to modify its injunction; and on May 21, 1985 denied Trustee's motion to reconsider. (J.A. 344-356)

On June 24, 1985 this Court granted review on certiorari.

Statement of The Facts[6]

This case involves two separate lawsuits stemming from a series of bank transactions involving Bank, the individual Parsons, the parent corporation Parsons Steel, Inc. (Parsons-Mobile), its subsidiary, Parsons Steel Industries, Inc. (Parsons-

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judicata as to the state action. Because the state court judgment in effect nullified the federal court judgment in favor of the Bank, the federal court, pursuant to 28 U.S.C. § 2283, enjoined further prosecution of the state court action in order to protect or effectuate its prior judgment." (Footnote omitted.)

[7] 747 F.2d at 1381, n. 16; A-26. The court below held that there should be no modification in the following circumstances (747 F.2d at 1380; A 24-25)

> "If the UCC claim merely alleges that improprieties involving the Bank and Michael Orange prior to the sale resulted in the receipt of an unfairly low price for the company's assets, then the district court was correct in finding privity and barring the Trustee from asserting the UCC claim in state court. The Bank has already been required to defend its relationship with Michael Orange and OSI, Inc. and its role in the events leading up to the sale. These are the facts underlying the BHCA and fraud claims. The Trustee is in privity with the Parsons as to the adjudication of these facts and is bound by the federal adjudication of these matters."

All appendix citations of this opinion, e.g. "A-" hereafter refer to the petition.

[8] The majority opinion of the Court of Appeals below, 747 F.2d 1367 states fully the essential facts of this case.

Montgomery) and the Trustee in bankruptcy for Parsons-Montgomery.[9]

On February 15, 1979 the Parsons corporations and the two Parsons filed State Action against Bank and Herbert, its chief loan officer. The complaint generally averred fraud in connection with an alleged requirement by Bank that Parsons-Montgomery change its management and ownership as a condition for further loans; a promise of unlimited loans if such change was made; a failure to make such loans after such change; and alleged violations of Alabama law in connection with the foreclosure, repossession and sale of assets of Parsons-Montgomery. (JA 26-56)

On May 30, 1979 Parsons-Mobile and the two individual Parsons brought Federal Action—summarized by the court of appeals in that action (679 F.2d 242 at 244-246; JA 89-90 and 94):

> "The issue in this case is whether a bank is prohibited under the 1970 amendments to the Bank Holding Company Act, 12 U.S.C. §§ 1972-75 (1976), from conditioning additional credit on a change of corporate management and majority stock ownership. Parsons Steel, Inc. of Montgomery was a wholly owned subsidiary of the plaintiff company, Parsons Steel, Inc. of Mobile, owned by co-plaintiffs Melba and Jim Parsons. The subsidiary had been heavily financed on an on-going basis since 1976 by the defendant First Alabama Bank of Montgomery. By the fall of 1978, the bank had outstanding fully secured loans of one million dollars and was the subsidiary's largest creditor.

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[9] Parsons-Mobile was the sole owner of Parsons-Montgomery; of the 100 shares of Parsons-Mobile, James Parsons owned 1 share, Melba, his wife, owned 98 shares, and a Baptist minister owned the remaining share. Parsons-Mobile, the individual Parsons and the Trustee in bankruptcy are petitioners here.

"At about this time the subsidiary began experiencing financial difficulty and anticipated inability to repay its debts. Mr. Parsons and an agent of the bank discussed refinancing the subsidiary's debt. The discussion between Parsons and the bank not only focused on refinancing but also included an unsuccessful attempt to sell the subsidiary to an out-of-town corporation. After the first attempt to sell fell through, the bank contacted a local businessman, Michael Orange, with whom the bank had done business, to determine if he were interested in buying the subsidiary. Although Orange declined to buy the company, he apparently offered to take over management of the company for a fee plus a stock option.

"The plaintiffs claim that the bank conditioned the grant of any additional credit on Parson's agreement to accept Orange as the manager of the subsidiary with an option to acquire a majority interest in the subsidiary in lieu of other compensation. *The bank claims that it never agreed to extend any credit and did not require that Orange be granted the controlling stock option.* The jury found that the bank did condition the extension of credit on the appointment of Orange as manager and on granting the option.

"The District Court, although denying the defendant's motions for summary judgment and a directed verdict, heard all the evidence and ultimately granted the bank's motion for judgment notwithstanding the verdict. The plaintiffs contend that in granting the judgment n.o.v., the District Court usurped the function of the jury and substituted its judgment of the credibility of the witnesses for that of the jury."

* * * *

"* * **The subsidiary was in financial difficulty and the bank was simply reluctant to grant additional credit...*" (Emphasis supplied.)

It is difficult to understand Petitioners' argument that the foregoing is a "[recognition] that the trial court erred in holding Plaintiffs' evidence was not sufficient to create a jury question...." (Bf. p. 20) The argument is without merit.

As the court below noted (747 F.2d at 1370; A-3), Parsons-Montgomery was adjudicated an involuntary bankrupt in April of 1979 and its Trustee "chose not to participate" in Federal Action.[10] The district court found that the Trustee "was privy to the parties" in Federal Action. (A-35 of Petition.) The court of appeals below held (747 F.2d at 1378; A-20):

> "The district court in this injunction proceeding found that the Trustee was bound by res judicata because he was in privity with the plaintiffs in the BHCA action."[11]

The courts below have correctly held that the two complaints alleged the same acts or omissions. Introduced below (JA 9-25(a); Appendix A to this brief) is a side-by-side comparison of substantive paragraphs of the state and federal complaints. This comparison graphically demonstrates that the Federal and State complaints are virtual copies of each other. Incomprehensible are petitioners' repeated and erroneous assertions that Federal Action alleged "only" one claim and that "no issue litigated in the Federal Action was repeated in the State Action."[12]

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[10] The Trustee was added as a party plaintiff by the state court in State Action in October of 1979 and the Trustee's later pleadings "realleged" all paragraphs of the complaint in State Action as amended and previously filed. (JA 26-28)

[11] Petitioners thus erroneously assert (Bf. p. 7) that "[t]he district court made no finding that the Trustee had been 'virtually represented' by the parties to the Federal Action...."

[12] Brief, pp. 4, 11, 19, 21, 22, 27, 33, 36, 40 and 43. Petitioners obviously fail to understand that a "claim" or "cause of action" does not multiply by the process of alleging the same facts in different actions

Discovery was conducted jointly and simultaneously in State and Federal Actions, and all parties to this action participated.[13] Federal Action was tried first; the issue of liability was tried separately; and, after verdict for the plaintiffs, the district court granted Bank's motion for judgment n.o.v., and on June 17, 1981 dismissed Federal Action on its merits ("Federal Judgment"). (JA 72-88) The district court found numerous acts and omissions which were put in issue again and relitigated by plaintiffs in State Action. For example, the crux of the state allegations of fraud was an alleged promise of unlimited financing made with no intention to perform. Proof of this same promise of financing was necessary for recovery in the Federal Action. Although petitioners (plaintiffs there) sought to prove such a promise, Bank denied that one was ever made.[14] The district court in its 1981 Federal Judgment held that:

> "This Court is of the opinion that no reasonable person would conclude from that conversation that the Bank agreed to lend either figure." (JA 80)

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and splitting the remedies sought or theories of recovery. Petitioners erroneously assert (Bf., p. 8) that *Restatement of Judgments,* 2nd, § 24, is not good law, although this Court, as discussed, *infra.* in Part II of Argument, has characterized the *Restatement* definition there as a "pragmatic approach" to the definition of a "cause of action." *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 525, n.12.

[13] The cover and appearance sheets of 15 separate depositions are included in the Joint Appendix (JA 368-397). These materials show appearances and participation by attorneys for all petitioners, including the Trustee in bankruptcy of Parsons-Montgomery, and all contain the express stipulation that the depositions "may be used in both cases."

[14] See opinion in appeal from Federal Action, 679 F.2d 242 at 244-246.

Another area common to the Federal and State actions concerned involvement of one Michael Orange. The court of appeals in 679 F.2d 242, 244-46, *supra.*, pp. 5-6, has recounted the federal testimony. The State action plaintiffs similarly contended that Bank agreed that if Orange became chief executive officer and obtained a majority interest in the Parsons-Montgomery subsidiary, Bank would make additional loans to subsidiary. State plaintiffs also contended that Bank required Orange as part of a fraudulent conspiracy to take over subsidiary. On this issue the district court's Federal Judgment contains extensive findings, including (JA 84):

> "Parsons' theory for recovery seems to rise or fall upon an implication that somehow the Bank maneuvered Mr. Parsons into the situation that he could not refuse Orange's offer to manage the business for $10,000.00 and a controlling interest. However, Mr. Parsons admitted that he made no other attempt to get anyone else to manage the business, and he offered no evidence that he had any dissatisfaction with the arrangement he made with Orange. Only after Orange became manager of the business and (finding that the financial condition and credit of the business was worse than Orange had been led to believe by Parsons) had stated that he could not continue, did Parsons find any criticism of the business proposal made by Orange."

In view of petitioners' repeated mischaracterization of these findings as "immaterial" and "mere dicta" (e.g. p. 20), particularly noteworthy is the critical importance accorded these findings by the court of appeals below (747 F.2d at 1371; A-6-7):

> "In an opinion granting the bank's motion for judgment n.o.v., the federal court made several important findings of fact in addition to holding that the Bank did not violate the BHCA.

* * * *

> "Although the Bank introduced Orange to Parsons as a potential purchaser of the company, Parsons and Orange reached an agreement independently of the Bank. * * * In the final analysis, the district court found that the Bank had not promised the Parsons anything, nor had it forced the Parsons to take any action. It was not until the actual foreclosure and sale of assets, a normal procedure, that the Parsons had to give up ownership of the company's assets, which resulted in Parsons-Montgomery being adjudicated an involuntary bankrupt. It is undisputed that the Bank, at all relevant times, had a right to proceed with this foreclosure.
>
> "In view of these findings, the district court in this injunction proceeding found that its earlier judgment was res judicata as to the Parsons' state claims of fraud and commercial unreasonableness."

Moreover, Bank introduced below an analysis of the allegations of the plaintiffs in their state complaints; the complaints themselves; the entire state court docket sheet; proposed witness lists, and lists of those who actually testified. This evidence was supplemented by Exhibits 9 and 10 of the Parsons which contained the contentions of the parties in State Action. (JA 221-226)

The analysis of the state complaints and the complaints themselves—when compared with the foregoing findings and opinion of the district court in Federal Action (JA 72-88)—demonstrate the correctness of its conclusion in this case that the state plaintiffs sought to "relitigate identical issues in separate courts." (A-32) And the contentions of state plaintiffs Parsons (Defendants' Exhibit 10; JA 224) confirm this conclusion. Indeed, those contentions, referring to the state complaint for elaboration, track almost precisely the subject matter

of the findings and opinion of the district court in Federal Action.[15]

Petitioners have argued strenuously—and erroneously—that the issue of the commercial reasonableness of the foreclosure sale of subsidiary's assets to Orange's company—an issue in State Action as to all plaintiffs there—was not decided in Federal Action. The federal complaint and the district court's findings clearly contradict this erroneous assertion.

The side-by-side comparison of the two complaints (JA 9-25(a); Appendix A) shows that paragraph 27 of Federal complaint and paragraph 30 of State complaint contain substantially identical allegations of commercial unreasonableness, and claim to the penny identical damages of $2,419,945.89, said to flow from the alleged wrongful acts and omissions. And the district court's Federal Judgment found:

> "On January 8, 1979, Mr. Herbert, the loan officer at the Bank, reviewed the files and, finding Parsons Steel of Montgomery seriously in arrears, commenced foreclosure proceedings against Parsons Steel. On that date, Mr. Parsons went into the Bank and signed waivers in which he acknowledged full notice of foreclosure proceedings and

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[15] (a) Promises of Bank to advance additional funds; (b) promises of Herbert to make additional loans and advances if Parsons "would make Orange chief executive officer of subsidiary and grant him a majority interest in the stock of subsidiary"; (c) Orange's statement to Jim Parsons that Orange would seek additional loans from Bank for Parsons-Montgomery; (d) Bank "through Richardson [and Herbert] led Parsons to believe that [Bank] would provide for the continuing financial needs of [subsidiary]"; and (e) "the representations set out above were made by Defendants as part of the conspiracy to defraud Plaintiffs were false and were made without the intention of performing them at that time and specifically to induce action by these Plaintiffs." Moreover, there was a contention that "the sale of the assets of [subsidiary] on or about January 17, 1979 was conducted in a commercially unreasonable method and manner in violation of Alabama law. These Plaintiffs claim damage for injuries suffered as a result of the commercially unreasonable sale separate and in addition to damages suffered by [subsidiary]."

waived other notice normally to be given him with full knowledge that Mr. Orange was to purchase the business for an amount sufficient to pay the Bank the full amount owed it. Mr. Parsons told Mr. Herbert that he was glad it was over and that he was through and was returning to Mobile to his other business. (JA 77)

* * * *

"Indeed, Mr. Parsons admitted that he was glad the final foreclosure was over. * * * Mr. Parsons signed waivers agreeing to foreclosure of mortgages with knowledge that Mr. Orange would buy in at the mortgage sale. As a result of this foreclosure, Mr. Parsons was relieved of a personal obligation to the Bank of at least $176,000.00, his wife was relieved of a substantial personal obligation, and his Mobile business' premises were relieved of a mortgage for at least $200,000.00. (JA 81)

* * * *

"Even then, Parsons and Orange discussed—and Parsons appeared to agree—that Parsons' best interest lay in a foreclosure by the Bank whereby Orange would pay off the Bank's loan on which Mr. Parsons was surety and on a part of which Mrs. Parsons was surety. Their interest was in avoiding personal liability. (JA 84)

* * * *

"(See his waiver of notice, etc.):..." (JA 86)

The court of appeals below agreed.[16]

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[16] (747 F.2d at 1373; A-11): "Allegations that the sale was commercially unreasonable were included in the federal BHCA complaint as part of the proof of damages. That is, the Parsons alleged that the defendants' wrongful conduct prior to the sale resulted in the Parsons not receiving a fair price for their company assets at the foreclosure sale."

Wholly irrelevant are the repeated assertions of petitioners that respondents are barred from seeking injunctive relief under 28 U.S.C. § 2283 because they raised defenses of res judicata and collateral estoppel in State Action. Since injunctive relief presupposes an absence of other adequate remedies, it is important for this Court to know the extensive efforts of Bank to exhaust other remedies before seeking federal relief against such impermissible attempts to relitigate.

The decision affirming Federal Judgment, 679 F.2d 242, came down on June 25, 1982 (JA 89) and rehearing was denied on August 24, 1982. The state action case summary (Plaintiffs' Exhibit 1; JA 167-180) shows that the first state judge withdrew after recusal on August 27, 1982 (JA 175); that renewed motions for summary judgment and supporting materials were filed on October 12, 1982, were heard on October 14 (JA 175), and were not denied until January 13, 1983 (JA 176); that motions for reconsideration were filed including a request by Bank and Herbert on January 28, 1983—on the eve of the scheduled trial—that the state trial court "certify res judicata question to appellate court. . ." (JA 177) Only after Bank and Herbert faced irreparable injury—the possible loss of millions of dollars from attempted state relitigation—did they seek the federal injunctive relief to which the courts below correctly held they were entitled. They were then clearly deprived of the fruits of their earlier federal victory and a federal injunction was plainly essential to protect the integrity of the earlier federal judgment and to effectuate it.

The court below correctly held (747 F.2d at 1376; A-17):

> "We see no reason to disturb this holding. The Bank should not be penalized for its reluctance to come back to federal court while it was not clear whether the federal court's prior judgment was in danger of being nullified.
>
> * * * *
>
> "A federal court is empowered to enjoin state court proceedings to protect its judgment and § 2283 does not limit this power to specific points in time in state court trials or appellate procedure."

Trustee argues that he was deprived of an opportunity to present evidence in Federal Action in support of his claims of a commercially unreasonable foreclosure sale. Upon remandment to the district court, however, the evidence presented there was without dispute that his lawyer, in State Action, adopted the Parsons' lawyers' arguments to the jury; and, as the district court found,[17] "every word of the Trustee's attorneys' statements during the State Court trial was devoted to presale activities of Michael Orange and the Bank's agent Herbert. No suggestion was made that the Defendants in the State court case did anything wrong after the sale." The court below correctly held that the Trustee was bound by the adjudication in Federal Action.[18]

In a remarkable error, petitioners assert (p.7) that the district court "made no finding that the injunction was necessary to 'protect or effectuate' its prior judgment but instead based the injunction solely on its conclusion that the Federal Action barred the State Action although clearly recognizing the two actions involved different causes of action." This statement is wholly inaccurate. The district court issued its injunction "to bar further relitigation of proceedings already decided in this Court"; and noted the public interest "in deterring relitigation of suits."[19] Moreover, as already noted, the court of appeals held that the district court issued its injunction "to protect or effectuate its prior judgment," because the state court judgment "nullified" the earlier federal court judgment.[20]

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[17] Opinion of March 29, 1985, JA 349-350, and Appendix A to Opposition.)

[18] 747 F.2d at 1380; A 24-25. See, quotation, n. 7, *supra.*

[19] A-42 of petition.

[20] *Supra,* n. 6

Exacerbating this inaccuracy, petitioners argue (p.7) that the court of appeals majority, in an "unprecedented decision," held that § 2283 was an exception to the full faith and credit act. The actual holding below was that, although § 2283 generally prohibited injunctions to stay proceedings in a state court, Congress had conferred that power on federal courts—as an exception to this prohibition—when it enacted the relitigation exception in 1948; and "while a federal court is generally bound by other state court determinations, the relitigation exception empowers a federal court to be the final adjudicator as to the res judicata effects of its prior judgments on a subsequent state action."[21]

Petitioners mislead in their attempted characterization of the dissenting opinion below. (Bf., p. 9) They pointedly overlook that judge's agreement with the district court and the majority below "that the state court litigation repeated the federal court issues—or issues that could have been resolved there." (747 F.2d at 1382; A-30)

SUMMARY OF ARGUMENT

I.

The courts below have correctly interpreted and applied the anti-injunction statute, 28 U.S.C. § 2283 in a classic context—to effectuate an earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to respondents the fruits of their earlier federal victory. This is precisely why Congress enacted the relitigation exception of § 2283 in 1948, namely, to assure by express legislative language that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate" their judgments.

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[21] 747 F.2d at 1376; A-16.

Congress rejected the alternative posed by the majority in *Toucey v. New York Life,* 314 U.S. 118. Congress opted to protect a federal judgment against becoming the mere basis for a plea of res judicata—to be examined by another court unfamiliar with the record already made—to determine whether the issues were or were not settled by the former adjudication. Moreover, Congress decided that the federal district judge who had conducted the earlier litigation knows best what he did and did not decide. The court below thus correctly noted that "the federal district judge, having tried the federal action, was in a uniquely qualified position to determine that the federal action was res judicata as to the state action." (747 F.2d at 1375; A-14)

This Court has expressly recognized that Congress, when it enacted the "relitigation exception" to § 2283, had legislated so as to permit "a federal court to enjoin relitigation in a state court of issues already decided in federal litigation." *Mitchum v. Foster,* 407 U.S. 225, 235; *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630, et seq.

An injunction by a federal district court against enforcement of a state court judgment, issued "to protect or effectuate" an earlier federal judgment of that court, does not constitute impermissible review of a state court judgment and impingement on the appellate powers of this Court. Nor does 28 U.S.C. § 1738 prevent a federal court from exercising the powers conferred by Congress in § 2283 and staying by injunction a later state judgment which seeks to nullify the prior judgment of that federal court. Federal res judicata law applies when a federal court is determining the effect of a federal judgment, as the court below correctly held. Restatement of Judgments 2d, Sec. 87.

Moreover, the court below correctly held that the power conferred on federal courts under § 2283 "does not limit this power to specific points in time in state court trials or appellate procedure." (747 F.2d at 1377; A-17) *Hill v. Martin,* 296 U.S. 393, 403.

II.

Petitioners sought to relitigate in the Alabama state court matters which had been litigated and decided against them in the Federal Action; and to litigate other matters which were not, but which could have been litigated in the Federal Action. Without question, the verdict and judgment in State Action deprived respondents of the fruits of their earlier judgment on the merits in Federal Action. Petitioners filed virtually identical compliants in both cases, even to the alleged damages incurred. In Federal Action they chose to seek a remedy only under the Bank Holding Company Act ("BHCA"), and to assert remedies for alleged fraud and commercial unreasonableness in State Action. This is precisely what res judicata, collateral estoppel and impermissible relitigation prohibit. Petitioners could have sought all of their state remedies as to all relevant parties in Federal Action, and were not limited there to relief under BHCA.

III.

Although the petition impermissibly seeks to raise for the first time a due process argument based on alleged unauthorized representation of the Trustee in the Federal Action, the argument itself has no merit. The Trustee was in privity with the other petitioners, as the courts below correctly found, and is bound by the federal adjudication of those matters. *Montana v. United States,* 440 U.S. 147; *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 524; *General Foods v. Mass. Dept. of Health,* 648 F.2d 784, 787 (1st Dir. 1981).

The Trustee's knowing election to stay out of Federal Action is reason enough to bar him from seeking to relitigate elsewhere issues which were in fact litigated in Federal Action; and matters which were not, but which could have been determined in Federal Action. The Trustee was adequately represented in the prior federal litigation; is in privity with the other petitioners; and is bound as they are by the results of Federal Action. Trustee had a full and fair opportunity to present evidence and argument.

ARGUMENT

I.

The Courts Below Correctly Interpreted and Applied the Anti-Injunction Statute 28 U.S.C. § 2283.

The courts below have applied the relitigation exception of 28 U.S.C. § 2283 in a classic context—to effectuate the earlier judgment of the district court; to enjoin its attempted nullification by a later state court judgment; and thus to safeguard to the victor in the earlier federal litigation the fruits of that victory. This is precisely why Congress enacted this exception to § 2283 in 1948, namely, to assure by express legislative language that federal courts have the power to enjoin proceedings in a state court "to protect or effectuate" their judgments. As the code reviser has noted, Congress intended to adopt, by this legislation, the position of the "vigorous dissenting opinion" in *Toucey v. New York Life,* 314 U.S. 118, 144.[22]

The arguments of petitioners offend more than the long established legislative policy embodied in § 2283. In any circumstances, these arguments offend as well the sound judicial policies enunciated by this Court that efficient judicial administration, and public confidence in the judicial process, dic-

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[22] So characterized by Congress which adopted it when it reversed the *Toucey* decision by the enactment of § 2283. This decision was criticized by the "vigorous dissenting opinion" (314 U.S. at 144):

> "This alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field." (Footnotes omitted)

tate the conclusion that "it is [no] longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Blonder-Tongue Labs. v. Univ. of Illinois Found.*, 402 U.S. 313, 328.[23] The offense is exacerbated at bar. After petitioners had a full and fair opportunity to litigate in Federal Action issues which they later sought to relitigate in State Action, they revealed a case so flimsy that no reasonable person could arrive at a verdict for petitioners; and a district court judgment, which set aside such a jury verdict and entered a judgment n.o.v. for Bank, was affirmed. 679 F.2d 242, 246.[24]

Petitioners erroneously assert that when federal courts determine whether an injunction against state proceedings is necessary to "protect or effectuate" their judgments, they review state court judgments, and thus impermissibly impinge on the exclusive power of this Court. The argument is wholly without merit. Courts and commentators have often described

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[23] This Court reiterated that conclusion in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327-328, and *Nevada v. United States*, 462 U.S. 1104, ____, 77 L.Ed.2d 509, 523, et seq.

[24] The test of *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969), after all of the evidence is viewed in the light and with all reasonable inferences most favorable to petitioners. That decision follows this Court's requirement in *Brady v. So. R. Co.*, 320 U.S. 476, 479-480, that judgment n.o.v. is appropriate only where "there can be but one reasonable conclusion as to the verdict." Although Trustee was not a party to Federal Action, he deliberately chose to stay out and his interests, as the courts below have correctly held, were fully and adequately represented in Federal Action by the parties plaintiff there and their attorneys.

the process Congress had in mind to safeguard the effect of federal court judgments.[25]

Congress, when it enacted § 2283 in 1948, confronted and overruled this Court's decision in *Toucey v. New York Life,* 314 U.S. 118, which had answered negatively the question: "Does a federal court have power to stay a proceeding in a state court simply because the claim in controversy has previously been adjudicated in the federal court?"[26] As this Court taught in *Mitchum v. Foster,* 407 U.S. 225, 236:

> "The congressional response to Toucey was the enactment in 1948 of the anti-injunction statute in its present form in 28 U.S.C. § 2283, which, as the Reviser's Note makes evident, served not only to overrule the specific holding of Toucey, but to restore 'the basic law as generally understood and interpreted prior to the Toucey decision.' "[27]

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[25] Obviously inapposite are cases such as *Rooker v. Fidelity Trust,* 263 U.S. 413 (cited in Petitioners' Bf. p. 17) which prohibit a federal injunction against a state judgment asserted to have been based on an unconstitutional state statute. And see, discussion of *A.C.L. v. Brotherhood,* 390 U.S. 281 at 287, *infra.* n. 31.

[26] 314 U.S. at 126.

[27] Footnotes omitted. One of these footnotes cites Revisors Note for an appropriate interpretation of § 2283; and this note cites the "vigorous" dissenting opinion of Justice Reed which Congress intended to adopt. Quoted, n. 22, *supra.*

Contemporary and knowledgeable commentary demonstrates that whatever philosophical arguments might have supported the proposition that ordered federalism permits review of state court determinations only in this Court, Congress—empowered to confer jurisdiction on lower federal courts—opted to permit those courts to review state court judgments to prevent relitigation of federal judgments in state courts; to "protect or effectuate" earlier federal judgments; and to assure that the winner in a federal court would not be deprived of the fruits of this victory by a later contrary state judgment which this Court might or might not decide to review.[28]

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[28] *Moore's Commentary on the United States Judicial Code,* § 0.03(49), pp. 410-411:

> "[Sec. 2283] overrules the holding of the *Toucey* case and adopts the theory of the 'relitigation' cases, which *Toucey* had rejected. In other words where a federal court has adjudicated a matter, this court can protect or effectuate its judgment, whether in personam or in rem, by enjoining, at the instance of the prevailing party, relitigation of the matter. The party prevailing in the federal court is not obliged to plead his federal judgment in the state court action and, if eventually unsuccessful, seek Supreme Court review of the adverse state judgment." (Footnotes omitted)

The American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts,* § 1372, p. 306 (1968) commented twenty years later:

> "It has been argued that the relitigation exception is undesirable, and that where there is another remedy, such as a plea of res judicata in the state court, the federal court, out of proper deference for the court of the state should not stay the state proceedings....Ordinarily a federal court would and should so defer. The requirements of irreparable harm and lack of any other adequate remedy apply implicitly under the present statute....But power should exist to grant the injunction in the unusual case where those requirements are met. The matter was put forcefully by Justice Reed in his dissent in the *Toucey* case:..."

Redish, *The Anti-Injunction Statute Reconsidered,* 44 U. of Chicago L. Rev. 717, 723-724 (1977) taught a decade later:

Another commentary has analyzed the process intended by Congress:

> "Since appeal of right no longer exists from a state court's failure to give res judicata effect to a federal decision, and since the Supreme Court's decisions to grant writs of certiorari are based more upon considerations of general public interest than of the interests of the individual litigants, interlocutory review of state court action by injunction seems a satisfactory mode of protecting federal judgments."[29]

This Court has expressly recognized that Congress, when it enacted the "relitigation exception" to § 2283, had legislated so as to permit "a federal court to enjoin relitigation in a state court of issues already decided in federal litigation." *Mitchum*

> "It is, of course true, as Justice Reed argued, that absent the relitigation exception the only recourse to preserve the finality of the prior federal judgment would be a plea of res judicata in the subsequent state court proceeding. But Justice Reed—and apparently the Congress in enacting the exception—concluded that such a remedy was wholly inadequate. * * * One possible explanation, not articulated by either Justice Reed or the Reviser, is that the relitigation exception reflects pervasive mistrust of the state courts' ability and willingness to comprehend federal judgments and to accord them proper respect."

Redish noted, moreover: (n. 31) "The overwhelming majority of decisions appear to proceed under the assumption that a party need not have sought and been denied res judicata relief in the state court action before seeking an injunction in federal court pursuant to the relitigation exception." Redish cited, as two of three illustrative cases, *Donelan v. New Orleans Term. Co.*, 474 F.2d 1108 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973) and *Woods Exploration Co. v. Aluminum Co. of Amer.*, 438 F.2d 1286 (5th Cir. 1971) *cert. denied*, 404 U.S. 1047.

[29] Note, *Federal Power to Enjoin State Court Proceedings*, 74 Harv. L. Rev. 726, 734, cited in *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer., supra*, n. 36.

v. Foster, 407 U.S. 225, 235. See also this Court's discussion in *Vendo Co. v. Lektro-Vend Corp.,* 433 U.S. 623, 630 et seq.

The decisions below do not contravene *A.C.L.R.Co. v. Brotherhood,* 398 U.S. 281, as petitioners erroneously suggest. This Court has repeatedly made plain that this case simply holds that federal courts do not have *inherent* power to enjoin state proceedings but must abide by the *express* exceptions to § 2283.[30] The injunction at bar was premised upon the specific relitigation exception in § 2283, and not upon any asserted inherent power of the federal court.[31]

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[30] See discussion in *Mitchum v. Foster, supra.* and *Vendo Co. v. Lektro-Vend Corp., supra.*

[31] Indeed, Justice Black, for the majority, and dissenting Justices Brennan and White agreed that a federal district court could enjoin a later state court judgment in order to "protect or effectuate" an earlier federal judgment. Although "[p]roceedings in state courts should *normally* be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court,..." the majority opinion recognized that § 2283 was an exception to this principle when federal intervention by a district court was necessary "to protect or effectuate" an earlier judgment of that federal court. (398 U.S. at 287; emphasis supplied.)

The majority in *ACL* held that the later federal injunction was precipitated by a supervening decision of this Court, and was not an effort by the federal district court to protect or effectuate an earlier judgment—a judgment which the majority found to have been based on the Norris-LaGuardia Act's withdrawal of "jurisdiction" of a federal court to issue an injunction in that labor dispute. 29 U.S.C. § 101. Thus, there was no decision on the merits. The dissenters disagreed and were of the opinion that the district court had, indeed, acted to protect or effectuate its earlier judgment—a judgment which "obviously decided considerably more than the threshold question of whether the Norris-LaGuardia Act withdrew jurisdiction to grant federal injunctive relief in the circumstances of this case." (398 U.S. at 299)

The quotation from *ACL* in Petitioners' brief (p. 24) is not even addressed to the relitigation exception of § 2283 but rather to the "necessary in aid of jurisdiction" exception.

A long line of federal decisions accord with the decision below.[32]

Petitioners attempt an extraordinary assault on the foregoing judicial authorities, legislative history, and knowledgeable commentary. They concede, remarkable to say, that the decisions below must stand if the court below correctly held: "it is now settled that the relitigation exception enables a federal court to enjoin state litigation which is precluded by the doctrine of res judicata." (747 F.2d at 1376; A-16) Petitioners argue that the court below had thus impermissibly expanded the scope of § 2283 and erroneously assert that "mere applicability of the doctrine of res judicata is not sufficient to justify an injunction of a state court proceeding." (Bf., p. 22) Petitioners would have this Court overturn almost 40 years of unbroken, and uniform interpretation of the congressional purpose when the 1948 relitigation exception was enacted as § 2283. The key was a congressional decision to adopt the dissent of Justice Reed in *Toucey,* that a federal judgment was entitled to federal injunc-

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[32] *United States v. District of Columbia,* 654 F.2d 802 (D.C. Cir. 1981), *cert. denied,* 454 U.S. 1082; *United States v. Amer. Society of Composers etc.,* 442 F.2d 601 (2nd Cir. 1971); *Allied Mutual Ins. Co. v. Roberson,* 306 F.2d 130 (4th Cir. 1962); *In re Corrugated Container Antitrust Litigation,* 659 F.2d 1332 (5th Cir. 1981), *cert. denied,* 456 U.S. 756; *Meridian Investing Development Corp. v. Suncoast Highland Corp.,* 628 F.2d 370 (5th Cir. 1980); *Bank of Heflin v. Miles,* 621 F.2d 108 (5th Cir. 1980); *Seaboard Coast Line R. Co. v. Union Camp Corp.,* 613 F.2d 604 (5th Cir. 1980), *cert. denied,* 449 U.S. 835; *Southwest Airlines Co. v. Texas International Airlines, Inc.,* 546 F.2d 84 (5th Cir. 1977), *cert. denied,* 434 U.S. 832; *Aerojet-General Corp. v. Askew,* 511 F.2d 710 (5th Cir. 1975), *cert. denied,* 423 U.S. 908; *Donelon v. New Orleans Terminal Co.,* 474 F.2d 1108 (5th Cir. 1973), *cert. denied,* 414 U.S. 855; *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047; *Silcox v. United Trucking Service,* 687 F.2d 848 (6th Cir. 1982); *Harper Plastics v. Amoco Chemicals Corp.,* 657 F.2d 939 (7th Cir. 1981); *Wood v. Santa Barbara Chamber of Commerce, 705 F.2d 1515 (9th Cir. 1983), cert. denied,* 104 S.Ct. 1446; *Brown v. McCormick,* 608 F.2d 410 (10th Cir. 1979).

tive protection and thus to something more than "only the basis for a plea of res judicata which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication." (314 U.S. at 144) Petitioners, indeed, go even further and attack the concern voiced by Justice Reed as a "weak" argument. (Bf., p. 25) Clearly, Congress did not agree and adopted his "vigorous" opinion as the legislative law of this land.

But petitioners' flawed analysis does not end here. They assert that even if Section 2283 does permit the injunction at bar, principles of comity, federalism and equity nevertheless require reversal. Again, petitioners urge this Court to ignore almost 40 years of consistent interpretation of a congressional determination. Congress then agreed with Justice Reed that a federal court winner could not be forced to bring a plea of res judicata in a state court, "unfamiliar with the record already made," and if eventually unsuccessful seek review in this Court of an adverse state judgment. Congress and the federal judiciary, since 1948, have considered that process an inadequate remedy, and not required by any principles of comity or federalism which Congress then rejected when it overruled *Toucey*.[33]

Petitioners cite cases (pp. 14-15) which discuss the preclusive effect, under 28 U.S.C. § 1738, of earlier state court decisions in federal courts. The short answer is that these cases are simply irrelevant to the issue in this case, namely, the authority of a

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[33] Petitioners' reliance on *Mitchum v. Foster*, 407 U.S. 225, 243, is misplaced. (Bf., pp. 26, et seq.) That case did not involve the relitigation exception of § 2283, and thus did not involve the policy determinations of Congress when it overruled *Toucey*. *Mitchum* found, even though unarticulated, express authorization by Congress to permit injunctions in civil rights actions under 42 U.S.C. § 1983 in certain circumstances.

federal court, under § 2283, to enjoin state proceedings in order to protect and effectuate a prior federal judgment. This Court in *Marrese v. Amer. Academy of Orthopedic Surg.*, ____ U.S. ____, 53 U.S.L.W. 4265, 4268, held that a federal court should not give greater claim preclusion effect to an earlier state judgment on the merits than the state itself would have given. Conversely, the court below has correctly held: "It is undisputed that federal res judicata law applies in the present case where a federal court is determining the effect of a federal judgment."[34]

The *reductio ad absurdum* of petitioners' argument is that a federal court would be powerless, despite § 2283, to stay any state proceeding which nullified its prior judgment *unless* a federal injunction issued whenever there was a possibility that a state court might rule on the preclusive effect of an earlier federal judgment, and before the state court had an opportunity to do so. Such an absurd process would exacerbate, and certainly not relieve, friction between state and federal courts; and it would thwart the carefully defined congressional purpose of the 1948 revision of § 2283.

Petitioners advance the spurious suggestion that this unseemly "rush"—and their imagined conflict between § 2283 and § 1738—can be avoided if a federal court seeks to protect or effectuate its earlier judgment by injunction *only when* a later state court judgment, although declining to recognize the bar of the prior federal judgment, is a non-final rather than a final state judgment. In the latter circumstance, petitioners argue that a federal injunction is impermissible because of § 1738. But the injunction below meets even petitioners' spurious test since it was issued when the state judgment had lost its finality by virtue

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[34] 747 F.2d at 1372, n.9; A-9. *Restatement of Judgments*, 2nd, § 87 accords: "Federal law determines the effects under the rules of res judicata of a judgment of a federal court."

of a timely and then pending post-trial motion for new trial and judgment n.o.v.[35]

Moreover, the court below correctly held that the power conferred on federal courts, under § 2283, to enjoin state court "proceedings" to protect their judgments, "does not limit this power to specific points in time in state court trials or appellate procedure." (747 F.2d at 1377; A-17) This Court, construing the term "proceedings" in a state court under the predecessor of § 2283, held that the term is "comprehensive" and "includes all steps taken or which may be taken in the state court . . . from the institution to the close of the final process. It applies to appellate as well as to original proceedings; . . ." *Hill v. Martin,* 296 U.S. 393, 403.[36]

The court below correctly rejected the argument made there, and renewed here, that Bank had waived its right to federal injunction by its attempt to seek a res judicata and collateral estoppel holding from the state court (747 F.2d at 1376; A-17):

> "The Bank should not be penalized for its reluctance to come back to federal court while it was not clear whether the federal court's prior judgment was in danger of being nullified."[37]

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[35] *Leishman v. Assoc. Wholesale Electric Co.,* 318 U.S. 203; *Healy v. Penn. R. Co.,* 181 F.2d 934 (3rd Cir. 1950); 9 Moore's Federal Practice, § 110.08[3]. Authorities interpreting the Federal Rules of Civil Procedure guide construction of Alabama's Rules of Civil Procedure. *Scott v. Lane,* 414 So.2d 939 (Ala. 1982).

[36] Other federal courts have agreed with the court below that § 2283 is not emasculated by a state court's refusal to be bound by an earlier federal judgment. *Silcox v. United Truck Serv.,* 687 F.2d 848 (6th Cir. 1982); *Brown v. McCormick,* 608 F.2d 410 (10th Cir. 1979).

[37] By means of an erroneous reading of *Restatement of Judgments,* 2nd, § 26, p. 2 35—a reading which ignores that section's direction to

The courts below correctly provided contemporary restatement of the importance which Congress gave in 1948 to the superior, and thus crucial, familiarity of a federal district court with what was litigated, or could have been litigated in a prior federal action which culminated in a judgment on the merits. The court below correctly noted that "the federal district judge, having tried the federal action, was in a uniquely qualified position to determine that the federal action was res judicata as to the state action." (747 F.2d at 1375; A-14)

II.

The Courts Below Correctly Invoked § 2283 In Order To Prevent Relitigation In The Alabama State Courts of Matters Which Were Or Could Have Been Litigated In Federal Action Which Had Culminated In A Prior Judgment On the Merits.

Without question the judgment in Federal Action was on the merits and was affirmed. (679 F.2d 242; JA 89). Without question petitioners sought to relitigate in the Alabama state court

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illustration 1 concerning actions "in the same jurisdiction"— petitioners seek to compound their baseless argument of waiver by suggesting waiver as well for a failure, *prior to federal judgment,* to object to a splitting of causes of action. Respondents could not have done so under applicable Alabama and federal law—two jurisdictions, not one. Under federal law, *Ermentrout v. Commonwealth Oil Co.*, 220 F.2d 527, 530 (5th Cir. 1955):

> "[T]he pendency of a state court action in personam is no ground for abatement or stay of a like action in the federal court, although the same issues are being tried and the federal action is subsequent to the state court action. The federal court may not abdicate its authority or duty in favor of the state jurisdiction. (Cit.)..."

The pendency of a later filed federal action does not require an election between that action and an earlier filed state one. Sec. 6-5-440, Alabama Code of 1975; *Johnson v. Brown Service Ins. Co.*, 293 Ala. 549, 307 So.2d 518.

matters which had been litigated and decided against them in the Federal Action; and to litigate other matters which were not, but which could have been litigated in the Federal Action. Without question the verdict and judgment in State Action deprived Bank and Herbert of the fruits of their earlier judgment on the merits in the Federal Action. Thus, the district court—in a classic case—correctly enjoined further prosecution of State Action.

Indeed, petitioners do not even present for review in this Court the question of the correctness of the decisions below that State Action was barred by the judgment in Federal Action under principles of res judicata and collateral estoppel. (Bf., p. 28, n.20)

The courts below, citing *Nilsen v. City of Moss Point,* 701 F.2d 556, 560, n. 4 (5th Cir. 1983), adopted the definition and comments of § 24 of *Restatement of Judgments,* 2nd.[38]

This Court's recent decision, *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 525, n. 12, has characterized Sec. 24 as a "pragmatic appro[illegible]h" to the definition of a "cause

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[38] "a. *Rationale of a transactional view of claim.* In defining claim to embrace all the remedial rights of the plaintiff against the defendant growing out of the relevant transaction (or series of connected transactions), this Section responds to modern procedural ideas which have found expression in the Federal Rules of Civil Procedure and other procedural systems.

* * * * *

"The present trend is to see claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split."

of action."[39] Petitioners clearly err when they argue (Bf., p. 28) that the court below "applied a definition of res judicata never accepted by this Court . . . "

Petitioners, attempting to split their claim or cause of action, filed virtually identical complaints in both cases, even to the alleged damages incurred. In Federal Action they chose to seek a remedy only under the Bank Holding Company Act[40] and to assert remedies for alleged fraud and commercial unreasonableness in State Action. This is precisely what res judicata, collateral estoppel and impermissible relitigation prohibit. Since petitioners could have asserted remedies for fraud and commercial unreasonableness in the Federal Action, but chose not to; and since—even if the causes of action had been different—collateral estoppel bars relitigation of the issues of

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[39] "Under this approach causes of actions are the same if they arise from the same 'transaction'; whether they are products of the same 'transaction' is to be determined by 'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' "

Moreover, this Court there noted with approval the earlier test in *Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 320:

> " ' "[A] party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." ' "

[40] 12 U.S.C. 1972-1975 ("BHCA")

promise to lend and commercial unreasonableness[41] which were decided on the merits in Federal Action, they may not relitigate these matters in State Action. Injunctions under § 2283 empower federal courts to prevent such tactics in order to protect and effectuate their earlier federal judgments, and safeguard to the victors the fruits of their victory.

Federal appellate courts have repeatedly held that 28 U.S.C. § 2283 is expressly designed to prevent the kind of relitigation attempted by petitioners in State Action.[42] For example, in *Woods Exploration & Pro. Co. v. Aluminum Co. of Amer.*, 438 F.2d 1286 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), the court held that the district court, after granting the federal defendants' motion for judgment n.o.v., properly en-

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[41] The following argument of Parsons counsel to the jury at the close of the Federal Action belies a contention now that the issue of "commercial unreasonableness" was not litigated in Federal Action:

> "[Mr. Orange] got the land, he got all of the assets, all of the coils. . . all of the equipment; everything out there. They shut out, effectively, the unsecured creditors. That is out, at this point. But they got a valuable piece of property, they get a good business; they get the Parsons' business. And they are going to tell you that Mr. Parsons benefited from this arrangement. They are going to try to tell you that Mr. Parsons actually dreamed this scheme up." (JA 198)

Significantly, the lawyer for Trustee argued in State Action:

> "Let me talk to you just briefly about the commercial unreasonableness...first thing in January, January 5, you got them figuring out how to walk away with all the goodies and leave the unsecured creditors and Parsons Montgomery out in the cold. . . . There was only one bidder there. One person, one buyer. It was all pre-arranged. It was done in secret. It was done in a hidden fashion. . . They handled it quietly. They say Jim Parsons waived notice, . . . they didn't want anybody else there. They were going to sell it to Michael Orange. They made that decision way back on the 10th or the 11th." (JA 330-331)

[42] See cases cited in n. 32, *supra*.

joined a pending state court action that was filed just prior to the federal action because the plaintiffs' claims in state court—state antitrust laws, willful misrepresentation, tortious interference with contract or advantageous business relationship and prevention of business expansion in violation of state law—could have been raised in the federal antitrust action under the doctrine of pendent jurisdiction.

The courts below relied on *Harper Plastics v. Amoco Chemicals,* 657 F.2d 939 (7th Cir. 1981) which is square and compelling support for the injunction. Petitioners' brief does not mention *Harper.* There Harper filed suit in federal court on antitrust grounds, and the action was dismissed for lack of jurisdiction and failure to state a claim. Pending the appeal of the dismissal of the federal action, Harper filed a complaint in state court based on the same conduct as that alleged in the federal action. The Seventh Circuit affirmed the district court's injunction against these state court proceedings, and held (657 F.2d at 945):

> "*[R]es judicata* operates to bar litigation of matters that should have been raised in the prior proceeding. The prior judgment is conclusive 'not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, but also as to every ground of recovery or defense which might have been presented.' ... This application of the doctrine of *res judicata* operates to prevent the splitting of a single cause of action and the use of several grounds for recovery under the same action as the basis for separate suits.... An unsuccessful party may not, therefore, frustrate the doctrine of *res judicata* by cloaking the same cause of action in the language of a theory of recovery untried in the previous litigation."
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> * * * *
>
> "...[A]ppellant had an ample opportunity to advance its several theories of relief in its federal pleading. It elected

not to do so at its own peril, and cannot now argue that there are as many causes of action arising out of the transaction as there are conceivably relevant theories of relief."

The *Harper* court noted that the facts alleged in the state complaint were the same as those alleged in the federal complaint—precisely the situation now before this Court—and held that the federal court plaintiff had a duty to assert any possible state law claims.[43]

Petitioners make the curious argument that their ability to join state law claims in Federal Action was "highly questionable." (Bf., p. 25, n. 18) Surely petitioners do not suggest that the citizenship of additional parties, such as Trustee, Orange, or Herbert, would have defeated federal jurisdiction in the BHCA case, where jurisdiction was based on that federal statute, and not on diversity. The complete answer, whatever their argument, is contained in several cases brought and decided under the same provisions of BHCA which petitioners pursued. Those plaintiffs sought BHCA and state remedies in one

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[43] (657 F.2d at 945-946):

"Here, there was one set of facts alleged in both pleadings, describing a transaction before the sale of F.L.W. Because the Robinson-Patman Act and the law of contracts in the State of Illinois merely provided separate grounds for relief in a single cause of action, appellant would ordinarily be expected to bring both remedies together in a single proceeding. It therefore appears that the exercise of pendent jurisdiction would have been appropriate in this case.

"We fail to discern the unfairness in requiring a plaintiff to join all relevant theories of relief in a single proceeding. The uncertainty over whether a trial judge would exercise pendent jurisdiction does not justify permitting the institution of a multiplicity of proceedings which may have the effect of harassing defendants and wasting judicial resources. If appellant entertained any doubts at the pleading stage, they should have been resolved in favor of joinder."

federal action against those banks and other natural and artificial persons, including residents of the states in which those federal actions had been brought. *Tose v. First Pennsylvania Bank,* 648 F.2d 879, 898 (3rd Cir. 1981), cert. denied 454 U.S. 893, (state law claims for intentional interference with business under state law); *Duryea v. Third Northwestern Nat'l Bank of Minneapolis,* 606 F.2d 823, 824 (8th Cir. 1979) (state antitrust law, common law fraud, unjust enrichment, state blue sky law); *Clark v. United Bank of Denver,* 480 F.2d 235, 237 (10th Cir. 1973), cert. denied, 414 U.S. 1004 (breach of fiduciary duty, fraud, unfair competition and breach of warranty.)

III.

The Trustee In Bankruptcy Of Subsidiary Was Correctly Enjoined.

Although the petition impermissibly seeks to raise for the first time a due process argument based on alleged unauthorized representation of the Trustee in the federal action,[44] the argument itself has no merit. The court below, as the district court, held that as to facts relating to BHCA and fraud claims, "the Trustee is in privity with the Parsons as to the adjudication of those facts and is bound by the federal adjudication of those matters."[45] See *Montana v. United States,* 440 U.S. 147. The court below remanded to give the Trustee an opportunity to convince the district court that his UCC claim was not based on the same alleged improprieties; and the Trustee was unable to do so.[46] Indeed, a case cited by petitioners, *General Foods v.*

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[44] Issues never adequately alleged and considered below are not before this Court. *Tennessee v. Dunlap,* 426 U.S. 312, 314, n. 2; *Capital Cities Cables v. Crisp,* 467 U.S. ____, 81 L.Ed.2d 580, 588; and *California v. Taylor,* 353 U.S. 553, 557, n. 2.

[45] 747 F.2d at 1380; A-25.

[46] District court orders of March 29 and May 21, 1985, JA 344-356.

Mass. Dept. of Health, 648 F.2d 784, 787 (1st Cir. 1981), enunciates the appropriate test that due process permits a non party to be bound by a judgment if "he had directly or vicariously a full and fair opportunity to present evidence and argument." Petitioners' other cases (Bf., pp. 32-35) apply the test and also hold questions of privity and adequate representation to be fact issues.

The Trustee's knowing election to stay out of Federal Action is reason enough to bar him from seeking to litigate elsewhere issues which were in fact litigated in Federal Action—commercial unreasonableness and state law fraud (collateral estoppel); and matters which were not, but which could have been determined in Federal Action which involved the same cause of action as State Action (res judicata).[47]

Although Petitioners' brief ignores the authorities, the courts below followed and quoted extensively from *In re Four Corners Enterprises,* 17 B.R. 156 (M.D. Tenn. 1982) and *Paradise v. Vogtlandische Maschinen-Fabrik,* 99 F.2d 53, 55 (3rd Cir. 1939); and, because of the foregoing circumstances, the court below rejected the Trustee's contention that he had not had a

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[47] Trustee's attorney was present and had an opportunity to participate in 15 pretrial depositions taken for both Federal and State Actions. (J.A. 368-397) This circumstance supports the finding of the court below (747 F.2d at 1379; A-23): "The Trustee was aware of the federal court proceeding and was free to intervene on the bankrupt corporation's behalf. Instead, he declined to get involved because he felt the suit was frivolous and would be a waste of money for the unsecured creditors he represents." The Trustee knew the allegations of the complaint in Federal Action. It is incredible that petitioners assert: "There is simply no evidence...to support the...contention that the Trustee made a conscious decision to refrain from joining the Federal Action." (Bf., p. 36)

full and fair opportunity to litigate in Federal Action and had not been adequately represented there.[48]

Moreover, Trustee was in fact adequately represented in Federal Action; is in privity with the other petitioners; and bound as they are by the results of Federal Action as to matters which were raised and decided and as to matters which were not, but could have been. *Nevada v. United States,* 462 U.S. 1104, ____, 77 L.Ed.2d 509, 524.[49]

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[48] The court below there stated (747 F.2d at 1379; A-22):

" 'The trustee was well aware of these proceedings (the prior federal action) and made no effort to intervene as an interested party. *** Under these circumstances, the trustee cannot complain that he lacked a full and fair opportunity to litigate the issue in question at the federal district court proceeding. Collateral estoppel thus precludes the trustee from relitigating this issue.' *Four Corners, supra,* at 160."

[49] "Simply put, the doctrine of res judicata provides that when a final judgment has been entered on the merits of a case, [i]t is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.' *Cromwell v. County of Sac,* 94 US 351, 352:..."

See, also, Southwest Airlines Co. v. Texas, 546 F.2d 84, 94-95 (5th Cir. 1977):

"[F]ederal courts have repeatedly held that judgments can bind persons not party to the litigation in question.

* * * *

"Federal courts have deemed several types of relationships 'sufficiently close' to justify preclusion. First, a nonparty who has succeeded to a party's interest in property is bound by any prior judgments against the party. (Cit.) Second, a nonparty who controlled the original suit will be bound by the resulting judgment.

Certainly, Parsons-Montgomery and its Trustee were adequately represented in the prior litigation. Its parent corporation, Parsons-Mobile, and the holders of 99% of the stock of the parent, were parties in Federal Action.[50] Trustee joined in the pleadings of the other plaintiffs, and throughout State Action, took positions in that case consistent with the individual Parsons and Parsons-Mobile.

Repeatedly, and in numerous forms, petitioners argue that disparate interests among the Parsons, the parent corporation and the bankrupt subsidiary militate against the application of res judicata and collateral estoppel. Petitioners even go so far as to assert that intervention and ultimate victory in Federal Action would have accomplished nothing of benefit to the bankrupt subsidiary. (Bf., pp. 33 and 38) This is nonsense. Surely petitioners do not contend that parent Parsons corporation, asking for $2,419,945.89 for diminution of the value of its stock in the bankrupt subsidiary, was entitled to one recovery of

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(Cit.) Third, federal courts will bind a nonparty whose interests were represented adequately by a party in the original suit." (Cit. omitted)

Aerojet-General Corp. v. Askew, 511 F.2d 710, 719-20 (5th Cir. 1975):

"Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative....
The question whether a party's interests in a case are virtually representative of the interests of a nonparty is one of fact for the trial court. (Cit.)" (Emphasis supplied.)

[50] See *Kreager v. General Electric,* 497 F.2d 468 (2nd Cir. 1974), *cert. denied* 419 U.S. 61, which held that the sole stockholder of a corporation was bound by the dismissal of an earlier action brought in the name of his corporation.

this sum for damages arising out of the commercially unreasonable sale of the assets of subsidiary; and that the Trustee of the bankrupt subsidiary would be entitled to another identical recovery on behalf of the subsidiary. The court below correctly held that the damages sought against Bank in Federal Action specifically involved alleged damages to the wholly owned subsidiary as a proximate result of the alleged dealings between Bank and its debtor, the subsidiary; and indeed, that the bankrupt subsidiary, and thus its Trustee, "was the primary, if not sole, party damaged by the alleged violation of the Bank Holding Company Action."[51]

Indeed, there are litmus tests that Trustee and his State Action lawyers considered representation by the Parsons and their lawyers to be completely adequate. The witness list submitted by Trustee in State Action[52] not only specifies all persons who testified in Federal Action and in depositions taken in that action, but as to the very State Action, Trustee designated "any witness listed by co-plaintiffs [Parsons in State Action]." In argument to the jury, counsel for Trustee adopted the arguments of attorneys for the Parsons.[53] They have even filed joint papers in this Court.

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[51] District court opinion, A 40-41 of petition.

[52] Plaintiff's Exhibit 4 (J.A. 186).

[53] In his opening statement to the jury in State Action, an argument comprising one transcribed page, counsel for Trustee, "in the interest of time" adopted Parsons' counsel's "statement of what we expect the evidence to show." (JA 338) In his closing argument to the jury, counsel for Trustee stated: "I come to you behind [counsel for Parsons] who has stated the evidence to you as I have seen it." (JA 339) And see n. 41, *supra,* which compares the Parsons' jury argument in Federal Action with Trustee's jury argument in State Action. Both asserted rights on behalf of unsecured creditors.

The Parsons and their parent corporation—owners of all proprietary interest in a subsidiary said to have been injured by Bank—adequately represented the interests of the subsidiary in the federal action—"primary if not sole" interests alleged to have been damaged by the acts and omissions of Bank. In the language of *General Foods v. Mass. Dept. of Public Health, supra,* (p. 41), Trustee "had directly or vicariously a full and fair opportunity to present evidence and argument."

One would never know from reading petitioners' brief that Trustee has had a second opportunity to demonstrate that he sought to litigate in state court matters which were not litigated or could not have been litigated in Federal Action. The district court, in its order after remand of March 29, 1985 — after a painstaking comparison of pleadings, contentions and jury arguments in Federal and State Actions—concluded:

> "His claims of impropriety relate to .... failure to do those things prior to the sale which allegedly would have produced a fair price for the property sold. All of those matters have been litigated, and the Court of Appeals has affirmed a judgment for the defendant thereon. The Trustee, being in privy with the plaintiffs in that case, is bound by the proceeding."[54]

Epilogue

Respondents did not bring the federal case. Bank was sued there by the Parsons petitioners and Trustee deliberately chose to stay away. Dissatisfied with federal results, petitioners then attempted to relitigate in state court what was or could have been litigated in the federal action. The courts below correctly refused to countenance such tactics; enjoined further state pro-

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[54] A-9 from respondents' opposition; JA 351.

ceedings; and thus furthered the congressional purpose of § 2283.[55]

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the writ of certiorari should be dismissed as improvidently granted; alternatively that the decision and judgment below should be affirmed.

Respectfully submitted,

M. ROLAND NACHMAN, JR.
P. O. Box 668
Montgomery, Alabama 36101

Counsel of Record for Respondents

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[55] Noteworthy is *Donelon v. New Orleans Co.*, 474 F.2d 1108, 1114 (5th Cir. 1973):

> "[W]e cannot ignore the fact that here it was the [appellants] themselves who invoked the jurisdiction of the federal court.... Appellants themselves issued the invitations to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now that the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that 'Good Night Ladies' should have been played without...the preliminary injunction having been issued. This we have declined to do...."

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing Brief of Respondents upon counsel of record for Petitioners by depositing a copy in the United States mail, postage prepaid, addressed as follows:

Mr. Frank Wilson
Beasley & Wilson
418 South Hull Street
Montgomery, AL 36104

Mr. James Jerry Wood
641 South Lawrence Street
Montgomery, AL 36104

This _____ day of August, 1985.

M. Roland Nachman, Jr.

APPENDIX

EXHIBIT A

COMPARISON OF CORRESPONDING PARAGRAPHS OF STATE AND FEDERAL COMPLAINT

State Complaint	Federal Complaint
12. For a substantial period of time prior to November 30, 1978, "First Alabama" loaned "Industries" a considerable amount of money for operating and other purposes in its business. "Industries" in turn executed security agreements to "First Alabama" on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did "Industries" refuse to pay or fail to pay any of its indebtedness to "First Alabama." During the life of said loans "First Alabama," acting by and through its agents, servants, or employees, including "Herbert," advised and consulted with "Industries" in its business operation and management. "Herbert" personally took over the handling of said loans on a date prior to November 30 in the year 1978 due to the fact that the employee of the bank handling the loans left the employ-	12. For a substantial period of time prior to November 30, 1978, Defendant loaned Subsidiary a considerable amount of money for operating and other purposes in its business. Subsidiary, in turn, executed security agreements to Defendant on certain personal property and assets over the life in connection with said loans. At no time prior to November 30, 1978, did Subsidiary refuse to pay, or fail to pay, any of its indebtedness to Defendant. During the life of said loans, Defendant, acting by and through its agents, servants, or employees, advised and consulted with Subsidiary in its business operation and management. A Senior Vice President, Edward Herbert, personally took over the handling of said loans on a date prior to November 30, 1978, due to the fact that the employee of the bank handling the loans left the employment of Defendant. Subsequent to said date, Mr.

State Complaint	Federal Complaint
ment of "First Alabama." Subsequent to said date, "Herbert" advised and counselled with "Parsons" concerning the operation and management of "Industries."	Herbert advised and counselled with Subsidiary concerning the operation and management of Subsidiary.
14. On a later date and prior to November 30, 1978, "Herbert" again approached "Parsons" with a request that he enter into negotiations with another prospective purchaser, namely, "Orange." Shortly thereafter "Orange" came to "Industries' " location and looked over the operation. "Orange" later indicated to "Parsons" that he was not interested in purchasing the business, but planned to take over the management of "Industries" at the request and under the direction of "First Alabama" and "Herbert."	13. On a date prior to November 30, 1978, Defendant acting by and through its officer, agent, and employee, Herbert, approached Subsidiary with a request that negotiations be undertaken by Subsidiary with a prospective purchaser, namely Michael Orange. Shortly thereafter, Mr. Orange came to Subsidiary's business location and looked over the operation. Mr. Orange later indicated to Subsidiary that he was not interested in purchasing the business, but planned to take over the management of the company at the request and under the direction of Defendant.
13. Subsequent to the events alleged in paragraph 14, a local attorney, namely Samuel Kaufman, at the direction of "Herbert" and "Orange" was	14. Subsequent to the events alleged in paragraph 13 above, a local attorney, namely Samuel Kaufman, at the direction of Defendant and Mr.

State Complaint	Federal Complaint
employed to represent "Industries" to bring about a proposed composition of creditors. "Herbert" instructed "Parsons" to secure a certified audit of the assets and liabilities of "Industries" for distribution to all creditors of "Industries." "Parsons" then employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with "Herbert's" instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by "Industries." A balance sheet on "Industries" was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to "Orange." This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. "Orange" and "Herbert" refused to use this information and instead supplied information to Kaufman reducing the total assets of "Industries" from $2,384,945.89 to $1,034,000.00	Orange, was employed to represent Subsidiary to bring about a proposed composition of creditors. Defendant instructed Subsidiary to secure a certified audit of the assets and liabilities of the company for distribution to all of its creditors. Subsidiary had employed Vilas V. Vawtar and Associates, P.C., Certified Public Accountants, to comply with Defendant's instructions. The work was completed by the accounting firm during the period November 27-28, 1978, and the information made available to the bookkeeper regularly employed by Subsidiary. A balance sheet on Subsidiary was subsequently prepared as of November 30, 1978, by said bookkeeper, using the information supplied by the accounting firm and transmitted to Mr. Orange. This balance sheet showed, as of November 30, 1978, total assets of $2,384,945.89 with total liabilities of $1,910,747.09. Mr. Orange and Mr. Herbert refused to use this information and instead supplied information to Attorney Kaufman reducing the total assets of Subsidiary from $2,384,945.89 to $1,034,000.00

State Complaint	Federal Complaint
16. On or about December 14, 1978, "Orange" became Chief Executive Officer of "Industries" on the direct insistance of "First Alabama" and "Herbert." At said time, at the request of "Herbert," "Parsons" resigned as President of "Industries."	15. On or about December 14, 1978, Mr. Orange became Chief Executive Officer of Subsidiary on the direct insistance of Defendant, as a condition of Defendant's renewing Subsidiary's loans and extending operating loans, letters of credit, etc., in the future. At the request of Defendant, Jim D. Parsons resigned as President of Subsidiary as a further condition of credit by Defendant.
17. There was no significant change in the assets or inventory maintained by "Industries," nor in the liabilities of said company from November 27, 1978 to January 17, 1979.	16. There was not significant change in the assets or inventory maintained by Subsidiary nor in the liabilities of said company from November 27, 1978 to January 17, 1979.
18. Attorney Kaufman, at the request of "Orange" and "Herbert," sent a letter to all creditors of "Industries" dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by "Orange" with the overt concurrence of "Herbert." The proposal, mailed to all creditors, listed	17. Attorney Kaufman, at the request of Mr. Orange and Defendant sent a letter to all creditors of Subsidiary dated December 21, 1978, which in effect proposed a common law composition of creditors. This proposal was conceived by Mr. Orange and Defendant. The proposal, mailed to all creditors, listed the assets of Subsidiary as "approximately

State Complaint

the assets of "Industries" at "approximately $1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of "Industries," and stated further that "First Alabama" held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that "First Alabama" had refused to continue to carry "Industries' " loans unless "Industries" brought in new management, and further that "First Alabama" located "Orange" to fill this newly created management role. The proposal stated further that "First Alabama" conditioned restructuring of the existing debt of "Industries" upon acceptance of "Orange" to assume the position of President and Chief Executive Officer of "Industries" and that "Orange" had already assumed the management of "Industries." The proposal stated further that "Parsons" had resigned as President and

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$1,034,000.00" with liabilities of "approximately $1,948,000.00" and with a negative net worth of "approximately $914,000.00." The proposal stated that it was prepared by the management of Subsidiary, and stated further that Defendant held a secured position as against all creditors to the extent of $1,200,000.00. The proposal stated further that Defendant had refused to continue to carry Subsidiary's loans unless Subsidiary brought in new management, and further that Defendant located Mr. Orange to fill this newly created management role. The proposal stated further that Defendant conditioned restructuring of the existing debt of Subsidiary upon acceptance of Mr. Orange by Subsidiary to assume the position of President and Chief Executive Officer of Subsidiary, and that Mr. Orange had already assumed the management of Subsidiary. The proposal stated further that Jim D. Parsons had resigned as President and Chief Executive Officer of Subsidiary and that Mr.

State Complaint	Federal Complaint
Chief Executive Officer of "Industries" and that "Orange" had replaced him, and further, that "Parsons' " salary had been reduced by 50 percent and that he would continue to work with the company as Sales Manager under the direction and control of "Orange."	Orange had replaced him, and further, that Jim D. Parsons' salary had been reduced by 50 percent and that Mr. Orange would have full direction and control over Subsidiary.
19. The above proposal stated that "Industries" had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that "Industries" could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and the manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.	18. The above proposal stated that Subsidiary had a basically sound organization with buildings, machinery, and equipment in good condition. It stated further that Subsidiary could sustain a shipping volume increase from the present $3 million of annual sales to more than $5 million without any significant capital expenditures and that manufacturing and administrative costs were reasonable. It stated further that the "new management" believed the company could show an operating profit for 1979.
20. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of "Industries" to its	19. The furnishing of a fraudulent and highly misleading statement of the assets, liabilities, and net worth of Subsidiary to its

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creditors, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978.

21. A relatively small number of the creditors of "Industries" accepted the proposal submitted to them. At no time did "Parsons," or any employee, officer or director of "Industries," with the exception of "Orange," agree to the proposed composition of creditors, nor the approach taken. In fact, "Parsons" repeatedly told "Orange" and "Herbert" that it would not work and would be a financial disaster for "Industries" and that the creditors simply wouldn't buy the proposal. "Orange" and "Herbert" refused to listen to "Parsons" and placed him him in a subordinate position in the operation and management of the company as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise.

Federal Complaint

creditors, by Defendant and Mr. Orange, knowing the same to be false and misleading in several respects, portrayed an entirely different picture to the creditors than that which actually existed on November 30, 1978, and on the date of the proposal, viz., December 21, 1978. A relatively small number of the creditors of Subsidiary accepted the proposal submitted to them. At no time did Parent agree to the proposed composition of creditors, nor the approach taken. In fact, Jim D. Parsons repeatedly told Mr. Orange and Mr. Herbert that it would not work and would be a financial disaster for Subsidiary, and that the creditors simply wouldn't buy the proposal. Mr. Orange and Mr. Herbert placed Jim D. Parsons in a subordinate position in the operation and management of Subsidiary, as shown by the Kaufman proposal and the actual day-to-day operations at the plant site and otherwise. Defendant, acting by and through its officer, agent, and employee Mr. Herbert, because of its posi-

State Complaint	Federal Complaint
The Defendant "First Alabama," acting by and through its officer, agent, and employee "Herbert," because of its position, exercised almost total control over "Parsons" and "Industries" at this time.	tion of power, exercised total control over Subsidiary at this time.
22. The information supplied by Attorney Kaufman, at the request and under the direction of "Orange" and "Herbert," and subsequently mailed to all creditors of "Industries," was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of "Industries" to the creditors. Defendants "Orange" and "Herbert," individually, and as an officer, agent, or servant of "First Alabama," knew the information supplied to creditors to be false and misleading, and, by their active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.	20. The information supplied by Attorney Kaufman, at the request and under the direction of Mr. Orange and Mr. Herbert, and subsequently mailed to all creditors of Subsidiary, was false and misleading in several material and pertinent facts as set out herein. Said proposal substantially mistated the financial condition of Subsidiary to the creditors. Defendant knew the information supplied to creditors to be false and misleading, and, by its active participation in the preparation and dissemination of same to creditors, knowingly misled said creditors to the actual detriment of the creditors and Plaintiffs.

State Complaint	Federal Complaint
23. On a date in January of 1979, prior to January 9, when it became evident that the creditors would not accept the proposed composition, "Herbert" advised "Parsons" in a private conversation that the Bank would no longer finance the business operations of "Industries," nor would "Industries" be given additional time to secure other financing from other sources. On or about January 9, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all of the indebtedness of "Industries" would be due and payable on January 15, 1979, and that no additional time would be given to said company. The amount of the total indebtedness owed by "Industries" was stated to be $1,076,486.00 in principal with $33,925.13 interest as of said date.	21. On January 9, 1979, Defendant advised Jim D. Parsons that Defendant would no longer finance the business operations of Subsidiary, nor would Subsidiary be given additional time to secure other financing from other sources. On or about January 9, 1979, Defendant notified Subsidiary that all of its indebtedness to Defendant, stated as $1,076,486.00 in principal with $33,925.13 interest, would be due and payable on January 15, 1979, and that no additional time would be given to said company.
24. On or about January 11, 1979, "Orange" notified "Parsons" in writing that he was rescinding their agreement and that his working with "Industries" was not serving any purpose, which in effect gave notice that "Orange" would "cancel" his agreement with	22. On or about January 11, 1979, Mr. Orange notified Jim D. Parsons that he (Mr. Orange) would "cancel" his agreement with Subsidiary (his resignation required six months to take effect) and, thus, resign as Chief Executive Officer.

State Complaint	Federal Complaint
"Industries" which required six months to take effect and, thus, resign as Chief Executive Officer at the expiration of the stated time.	
25. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that all assets secured under the security agreements were being taken in and that physical possession would be taken by "First Alabama" on said date.	23. On or about January 15, 1979, Defendant notified Subsidiary that all assets secured under the security agreements were being taken in and that physical possession would be taken by Defendant on said date. On or about January 15, 1979, Defendant notified Subsidiary that Defendant would sell all collateral security to satisfy the aforesaid loans at Mr. Herbert's office on January 17, 1979 at 2:00 p.m.
26. On or about January 15, 1979, "Herbert," on behalf of "First Alabama," notified "Parsons" that "First Alabama" would sell all collateral security to satisfy the aforesaid loans at "Herbert's" office on January 17, 1979, at 2:00 p.m.	
27. On or about January 17, 1979, a private sale of the assets of "Industries" was made by "First Alabama" to "OSI," at 10:00 a.m. (two hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and	24. On or about January 17, 1979, a private sale of the assets of Subsidiary was made by Defendant to OSI, Inc., at 10:00 a.m. (four hours prior to the notice time), which purported to convey all rights and title in and to the said property and assets for a sales price of $907,000.00. A bill of sale was executed and delivered by

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delivered by "First Alabama" to "OSI" on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,252.65 certain described personal property of "Industries."	Defendant to OSI, Inc. on January 17, 1979, at 10:10 a.m., purportedly conveying for the consideration of $907,352.65 certain described personal property of Subsidiary.
28. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, "Herbert" and "Orange" were working in concert to acquire the business owned and operated by "Industries" in Montgomery County, Alabama for "Orange." The methods by which "Orange" took possession and obtained title to the assets and properties of "Industries" could never have happened as it did without the active participation and assistance of "Herbert," an officer, agent, and employee of "First Alabama."	25. At all material times in 1978, and specifically from November 30, 1978, to January 17, 1979, Mr. Herbert and Mr. Orange were working in concert to acquire the business owned and operated by Subsidiary in Montgomery County, Alabama for Mr. Orange. The methods by which Mr. Orange took possession and obtained title to the assets and properties of Subsidiary could never have happened as it did without the active participation and assistance of Mr. Herbert, a key officer, agent, and employee of Defendant.
29. The relationship between "Herbert" and "First Alabama" was, at all times pertinent hereto, that of agent and principal; the relationship between "First Alabama" and "Industries" was, at all times pertinent hereto, much more than that of banking institu-	26. The relationship between Mr. Herbert and Defendant was, at all times pertinent hereto, that of agent and principal; the relationship between Defendant and Subsidiary was, at all times pertinent hereto, much more than that

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tion and regular customer, the exact relationship being one of trust as described herein; the relationship between "Orange" and "Industries" as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and/or agent and principal. Both "Herbert" and "Orange" owed certain duties and responsibilites to their respective employers, the stockholders of both "First Alabama" and "Industries," and to all parties Plaintiff hereto. Their special relationship with "Industries" provided them with certain valuable confidential and insider-type information that only a person in their respective positions could have obtained concerning the operations of the business of "Industries," its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.	of banking institution and regular customer, the exact relationship being one of trust as described herein; the relationship between Mr. Orange and Subsidiary as of December 14, 1978 to the present and certainly at the time of his letter dated January 11, 1979, giving notice of his intended resignation (which required six months to take effect) was that of Chief Executive Officer and employer and or agent and principal. The special relationship of Mr. Herbert and Mr. Orange with Subsidiary provided them with certain valuable confidential and insider-type information that only persons in their respective positions could have obtained concerning the operations of the business of Subsidiary, its assets and liabilities, its customers and contacts, and other information which could later be used to their mutual advantage.

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30. The sale of the assets of "Industries" to "OSI," a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of "Industries," was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by "OSI" being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor was the property and assets sold for the fair market value thereof. The letter from "Herbert," on behalf of "First Alabama," dated January 15, 1979, to "Parsons" giving notice of the aforesaid private sale actually gave notice of sale to "Standard Steel Building Systems, Inc." and not of a sale to "OSI." This notice was given and received by the parties

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27. The sale of the assets of Subsidiary by Defendant to OSI, Inc., a corporation newly created in January of 1979, for the sole purpose of obtaining the assets and properties of Subsidiary, was not handled in a commercially reasonable manner, in that acquisition and sale of a highly complicated and complex manufacturing firm was completely transacted in less than two days with the price paid by OSI being substantially less than the market value of the assets and properties purported to be sold. In addition thereto, no additional persons or firms, who could have been purchasers, were given an opportunity to inspect the properties and submit bids. Said sale was not handled in conformity with reasonable commercial practices, nor were the property and assets sold for the fair market value thereof.

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thereto on January 15, 1979. At said date, "Parsons" was required by "Herbert" to sign a letter which had been prepared by "Herbert" (or at his discretion) which was explained by "Herbert" and purported to be a Waiver of Notice.	
31. On or about the 2nd day of January, 1979, and at all times thereafter, "Herbert" put great pressure on "Parsons" to require "Industries" to either (a) pay the indebtedness in full or (b) put "First Alabama" in possession of the assets and properties of "Industries" which would have put "Industries" out of business. At no time prior to said date had "Herbert," nor any other person on behalf of "First Alabama," given any indication that "First Alabama" would discontinue financial arrangements with "Industries" and/or "Parsons." In fact, "Parsons" had been led to believe that "First Alabama" would renew all of said loans and continue to finance "Industries" operations.	28. On or about the 2nd day of January, 1979, and at all material times thereafter, Defendant put great pressure on Subsidiary to require Subsidiary to either (a) pay the indebtedness in full or (b) put Defendant in possession of the assets and properties of Subsidiary which would have put the corporation out of business. At no time prior to said date had Defendant given any indication that it would discontinue financial arrangements with Subsidiary. In fact, Jim D. Parsons had been led to believe that Defendant would renew all of said loans and continue to finance the corporation's operations. Defendant made many unsecured loans to Jim D. Parsons at interest rates as low as 5% just prior to the above takeover.

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32. The Defendant "First Alabama," acting by and through its officers, agents, or employees, including "Herbert," the Defendant "Herbert," individually, and as an officer, agent, or employee of "First Alabama," the Defendant "OSI," acting by and through its officers, agents, or employees, including "Orange," the Defendant "Orange" acting individually and as an officer, agent, or employee of "OSI," actively participated in the scheme described hereinabove to take over the operation of the business affairs of "Industries," including its assets and properties which amounted to collusion between said Defendants to do great damage and economic harm to Plaintiffs and which effectively put "Industries" out of business for all practical purposes.	29. Defendant, acting by and through its officers, agents, or employees, including Mr. Herbert, actively participated in the scheme described hereinabove to take over the operation of the business affairs of Subsidiary including its assets and properties which amounted to collusion between said Defendant and others, including Mr. Orange, to do great damage and economic harm to Plaintiffs and which effectively put Subsidiary out of business.
36. Subsequently, "First Alabama," acting by and through "Herbert," took possession of the ongoing business operations of "Industries" as set out hereinabove, taking and selling all assets and properties of said corporation.	32. Subsequently, Defendant took possession of the ongoing business operations of Subsidiary as set out hereinabove, taking and selling all assets and properties of said corporation on January 17, 1979, at a private sale to OSI, Inc., a newly formed corporation.

Excerpts From Relief Sought:

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38. As a direct and proximate result and consequence of the acts of the Defendants described hereinabove, the Plaintiffs, separately and severally, suffered and sustained the following damages:	40. As a direct and proximate result and consequence of the acts of the Defendant described hereinabove, which violated Title 12, U.S.C.A. § 1971, et seq., the Plaintiffs, separately and severally, suffered and sustained the following damages:
a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.	a. Plaintiffs, individually and separately, sustained great damage to their general reputation in the business community, which prior thereto had been good.
b. Plaintiffs "Industries" and "Steel" sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future.	b. Plaintiff, Parent, sustained a loss of earnings due to an interruption of business profits for the months of December, January, and for that portion of the month of February which has expired, and they will suffer such losses in the future; the value of its stock in Subsidiary was rendered worthless and of no value (Subsidiary had assets and properties valued at approximately $2,419,945.89 as of January 17, 1979).
c. Plaintiff "Industries" sustained the loss of all of its assets and properties taken and now claimed by "First Alabama" and/or "OSI" in the value of $2,419,945.89.	c. Plaintiff, Parent, has been greatly damaged in the
d. Plaintiff "Steel" sustained a severe loss due to the	

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serious decline in its own sales and collections due to the problems associated with the aforesaid takeover of "Industries" by defendants.

e. Plaintiff "Steel," as a result of defendants acts and actions,, has been greatly damaged n the day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on accounts receivable, was forced to pay over to defendant "First Alabama" as a result of its personal guarantee real property with an appraised market value in excess of $950,000.00 losing title to the real estate as described hereinabove.

f. Plaintiff "Parsons," has been caused great worry, stress, mental anguish, and has been harrassed by defendants since the 11th day of January, 1979, all to his great damage and detriment.

g. Plaintiff "Mrs. Parsons" has been caused great worry, stress, mental anguish,

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day-to-day operation of its own business in that it has received a great deal of bad publicity, has lost business and sales, has failed to receive payments when due from its customers on account receivable; and, it was forced to pay over to Defendant as a result of its personal guarantee real property with an appraised market value of $1,003,000.00, losing title to the real estate as described hereinabove.

d. Plaintiff Jim D. Parsons, lost a good job, has been caused great worry, stress, mental anguish, and has been harrassed by Defendant since the 11th day of January, 1979, all to his great damage and detriment.

e. Plaintiff Melba L. Parsons has been caused great worry, stress, mental anguish, physical problems caused by worry, tension, and stress, and has been harrassed by Defendant since the 11th day of January, 1979, her stock in Parent has greatly diminshed in value, all to her great damage and detriment.

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physical problems caused by worry, tension, and stress, and has been harrassed by defendants since the 11th day of January, 1979, all to her great damage and detriment.	
h. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.	f. Plaintiffs, separately and severally, claim punitive damages based on the aforesaid actions of Defendants.